

# RECUSAL FAILURE

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## INTRODUCTION

The American judiciary is suffering from a terrible affliction: biased judges. I am not talking about the subconscious or unconscious biases—stemming from different backgrounds, experiences, ideologies, etc.—that everyone, including judges, harbors.<sup>1</sup> Rather, I am describing invidious, improper biases that lead judges to favor one litigant over another for reasons that almost everyone would agree should play no role in judicial decision-making: the desire to repay a debt of gratitude to those who helped the judge get elected and be re-elected.<sup>2</sup>

The bias problem is pervasive and affects more than just a few bad apples. Almost ninety percent of state court judges must face elec-

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1. Charles Gardner Geyh, *The Dimensions of Judicial Impartiality*, 65 FLA. L. REV. 493, 497 (2013) (“Judges have long been characterized as human beings subject to human prejudices. . . . If perfect impartiality is unattainable, the more pragmatic objective is to ensure that judges are ‘impartial enough’ to fulfill the role assigned them under state and federal constitutions: to uphold the rule of law.”). The view that judges act as mere umpires, without allowing any preconceptions to shape their decisions, has largely been discredited. *See, e.g.*, Theodore A. McKee, *Judges as Umpires*, 35 HOFSTRA L. REV. 1709 (2007) (discussing Chief Justice Roberts’s use of the metaphor during his confirmation hearing).

2. These biases and the reasons for their existence are discussed *infra* Part I.

tion to obtain or retain their office.<sup>3</sup> These judges are not low-level bureaucrats handling the administration of parking tickets; rather, they handle the most important issues that arise in our legal system, like constitutional rights,<sup>4</sup> voting rights,<sup>5</sup> and criminal law.<sup>6</sup> Our entire legal system depends on judges who decide cases according to the law. As judges and scholars have often recognized, an impartial judiciary is at the core of the American justice system and is one of the central pillars of a constitutional democracy.<sup>7</sup>

Judicial elections themselves are nothing new, having been around for over 150 years.<sup>8</sup> For at least three decades, we have suspected that elected judges are biased judges.<sup>9</sup> Recent empirical evidence of judicial bias has overwhelmingly confirmed our worst fears, and study after study has shown that elected judges systematically favor certain groups (contributors, in-state litigants, or groups taking a popular political position, for example) while disfavoring others (in particular, out-of-state litigants, criminal defendants, and litigants arguing unpopular political positions).<sup>10</sup> These biases have been exacerbated by a major transformation in judicial elections themselves,

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3. See Roy A. Schotland, *New Challenges to States' Judicial Selection*, 95 GEO. L.J. 1077, 1105 app. 2 (2007).

4. See, e.g., Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977) (discussing state court enforcement of federal constitutional rights).

5. See, e.g., Richard L. Hasen, *The Democracy Canon*, 62 STAN. L. REV. 69 (2009) (highlighting extensive litigation involving issues of election administration and voting rights in state courts).

6. See, e.g., Keith Swisher, *Pro-Prosecution Judges: "Tough on Crime," Soft on Strategy, Ripe for Disqualification*, 52 ARIZ. L. REV. 317, 317 (2010).

7. See, e.g., *In re Murchison*, 349 U.S. 133, 136 (1955) (discussing the importance of a fair trial in a fair tribunal); J. Thomas Greene, *The Rule of Law—Endangered?*, 225 F.R.D. 29, 29 (2004) (“[A] fundamental hallmark of the Rule of Law is that our system of rights, remedies and procedures is to be administered by an independent and impartial judiciary.”).

8. The most thorough history of judicial elections, including the reasons for their adoption, is JED HANDELSMAN SHUGERMAN, *THE PEOPLE’S COURTS: PURSUING JUDICIAL INDEPENDENCE IN AMERICA* (2012). Shugerman explains that judicial elections became popular in the 1850s when a financial crisis led voters to conclude that judges should be more independent of state legislatures. *Id.* at 123–43. *But see* Jona Goldschmidt, *Merit Selection: Current Status, Procedures, and Issues*, 49 U. MIAMI L. REV. 1, 5–6 (1994) (suggesting that judicial elections were part of the Jacksonian movement toward more democratic institutions).

9. The concerns about the impartiality of elected judges began to grow especially in the 1980s as judicial elections started to evolve. See, e.g., Stuart Banner, Note, *Disqualifying Elected Judges from Cases Involving Campaign Contributors*, 40 STAN. L. REV. 449, 465 n.87 (1988) (discussing concerns about biased elected judges); Mark Andrew Grannis, Note, *Safeguarding the Litigant’s Constitutional Right to a Fair and Impartial Forum: A Due Process Approach to Improprieties Arising from Judicial Campaign Contributions from Lawyers*, 86 MICH. L. REV. 382 (1987).

10. See *infra* Part I for a discussion of that evidence.

which have gone from “sleepy” and “low-key” to “wild” and “politicized” in a span of a couple decades.<sup>11</sup> This means that our debates about judicial bias will only intensify as judicial elections continue to evolve.<sup>12</sup>

If we accept the overwhelming evidence of judicial bias—and I believe we have no other choice given its sheer volume—we are left with an important question: how well does our approach to judicial bias address the problem? Generally, recusal has been our primary solution to concerns about partial judges. If a judge is biased or if there is so much as an appearance of bias, the judge must recuse himself from the case.<sup>13</sup> Recusal is the solution offered by the state and federal recusal statutes, state codes of judicial conduct, and even by the Justices of the U.S. Supreme Court in recent cases involving judicial elections, including *Republican Party of Minnesota v. White*<sup>14</sup> and *Caperton v. A.T. Massey Coal Co.*<sup>15</sup> As we commemorate the five-year anniversary of the *Caperton* decision, it is a good time to evaluate whether recusal has worked (and can work) to eliminate election-related judicial bias. In this Article, I argue that recusal alone has not only failed to ensure judicial impartiality, but also is an inadequate solution to the problem of judicial bias.

Part I of this Article will explain how three fundamental changes in the nature of judicial elections have created a major concern about judicial bias. The first is the spending explosion in judicial races.<sup>16</sup> Modern judicial elections require judges to raise significant amounts of money to get elected or re-elected. Who gives judges that money? Frequently, it is the very litigants and lawyers who are most likely to

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11. See Ethan J. Leib et al., *A Fiduciary Theory of Judging*, 101 CALIF. L. REV. 699, 723–24 (2013) (“Although judicial elections have traditionally been assumed to be sleepy, uncompetitive, and low-profile events . . . many recent judicial elections have been highly visible and effective methods for influencing policy, mobilizing issue advocacy, and unseating judges.”).

12. See David Pozen, *The Irony of Judicial Elections*, 108 COLUM. L. REV. 265 (2008).

13. For federal judges, 28 U.S.C. § 455(a) (2013) requires recusal whenever the judge’s “impartiality might reasonably be questioned.” State court judges are governed by codes of judicial conduct that use similar, if not identical, language. See MODEL CODE OF JUDICIAL CONDUCT r. 2.11(A) (AM. BAR ASS’N 2011); see also John Leubsdorf, *Theories of Judging and Judge Disqualification*, 62 N.Y.U. L. REV. 237, 238 (1987) (“Courts declare that impartiality is so important that a reasonable—albeit incorrect—appearance of bias compels recusal . . .”).

14. 536 U.S. 765 (2002).

15. 556 U.S. 868 (2009).

16. Michael S. Kang & Joanna M. Shepherd, *The Partisan Foundations of Judicial Campaign Finance*, 86 S. CAL. L. REV. 1239, 1248 (2013) (“With the increase in competitiveness of judicial elections, campaign spending has skyrocketed.”).

appear in front of those judges when they take the bench.<sup>17</sup> As a result, judges frequently hear cases where at least one of the parties or one of the lawyers either contributed to the judge's campaign or made an independent expenditure to support the judge's campaign.<sup>18</sup> In addition, judges who want to keep their jobs will have to raise more money in the future, likely forcing them to consider how their decisions will be perceived by their donors and special interest groups.<sup>19</sup>

The second cause of judicial bias stems from the promises that judges make on the campaign trail. The Supreme Court in *White* held that judicial candidates have a First Amendment right to announce their views on controversial legal issues.<sup>20</sup> Following this decision, special interest groups now often send judicial candidates questionnaires asking them to take positions on issues important to those groups.<sup>21</sup> As a result, judges frequently exercise that First Amendment right, and so they come into office with promises to keep.<sup>22</sup> A failure to keep those promises can have costly consequences in a future judi-

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17. See Paul D. Carrington & Adam R. Long, *The Independence and Democratic Accountability of the Supreme Court of Ohio*, 30 CAP. U. L. REV. 455, 474 (2002) ("Often, lawyers or litigants who are likely to appear before the judge constitute large proportions of the contributions to judicial candidates.").

18. *Siefert v. Alexander*, 608 F.3d 974, 990 (7th Cir. 2010) ("It is an unfortunate reality of judicial elections that judicial campaigns are often largely funded by lawyers, many of whom will appear before the candidate who wins."). Unfortunately, we do not have adequate state-by-state data from every state to know precisely how often this happens. A recent American Judicature Society study of the Supreme Court of Pennsylvania found that in sixty percent of cases, at least one of the litigants or lawyers had contributed to the campaign of at least one justice. See Shira J. Goodman et al., *What's More Important: Electing Judges or Judicial Independence? It's Time for Pennsylvania to Choose Judicial Independence*, 48 DUQ. L. REV. 859, 865 (2010).

19. One study has shown that state supreme court justices have "routinely adjust[ed] their rulings to attract votes and campaign money." See Joanna M. Shepherd, *Money, Politics, and Impartial Justice*, 58 DUKE L.J. 623, 625 (2009).

20. *Republican Party of Minn. v. White*, 536 U.S. 765, 774–78 (2002).

21. Goodman et al., *supra* note 18, at 869–70 (discussing the extensive use of questionnaires "seeking clear pronouncements of candidates' positions on controversial issues that often are the subject of litigation in the state courts").

22. Admittedly, the Court's decision in *White* only applied to "announcements," not "promises." *White*, 536 U.S. at 780. But as Justice Ginsburg explained in her dissent:

Uncoupled from the Announce Clause, the ban on pledges or promises is easily circumvented. By prefacing a campaign commitment with the caveat, "although I cannot promise anything," or by simply avoiding the language of promises or pledges altogether, a candidate could declare with impunity how she would decide specific issues.

*Id.* at 819 (Ginsburg, J., dissenting); see also George D. Brown, *Political Judges and Popular Justice: A Conservative Victory or a Conservative Dilemma?*, 49 WM. & MARY L. REV. 1543, 1598–99 (2008) ("After *White*, candidates can make pledges or promises by labeling them as announcements of views, even though the two are functionally similar."). And some scholars have speculated that the ABA's commitments and promise clauses are also likely to be struck down by the Supreme Court. See

cial election. These are rarely rule-of-law promises—to uphold the law, to act impartially, to be fair and just. No, the promises that the public seeks, and that judges make, are promises to be tough on crime, to restrict (or protect) abortion rights, to take on (or stand with) plaintiffs’ lawyers.<sup>23</sup>

Finally, as judicial elections become more contested, judges feel increasing pressure to decide cases in accordance with public, as well as donor, preferences. This leads to bias against unpopular litigants and unpopular causes.<sup>24</sup> This problem—termed “the majoritarian difficulty”<sup>25</sup>—is perhaps the most troubling for the justice system and the rule of law. When judges are forced to consider how a particular decision will affect the judge’s own job prospects, judges may no longer act impartially.<sup>26</sup>

In Part II of this Article, I discuss the promise of recusal as a solution to the judicial bias problem. Recusal is our tool of choice when it comes to addressing judicial bias; it is at the heart of state and federal rules of judicial conduct, as well as statutes regulating judicial bias.<sup>27</sup> It is the tool that was offered by Supreme Court in *Caperton*, and scholars and judges have written extensively about recusal.<sup>28</sup> Part

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Michelle T. Friedland, *Disqualification or Suppression: Due Process and the Response to Judicial Campaign Speech*, 104 COLUM. L. REV. 563, 607–08 (2004).

23. See Swisher, *supra* note 6, at 319–38 (discussing the incentives for judges to appear “tough on crime”); see also Amanda Frost & Stefanie A. Lindquist, *Countering the Majoritarian Difficulty*, 96 VA. L. REV. 719, 734 (2010); Polly Simpson & Sally Weaver, *Judicial Elections: Pollsters Want to Seat Far-Right Ideologues*, ATLANTA J.-CONST., July 16, 2004, at A13 (discussing the use of questionnaires to publicize candidates’ view on divisive social issues, including abortion, homosexuality, and school prayer).

24. The most unpopular litigants are generally criminal defendants and out-of-state litigants. The causes that are unpopular depend on the state. These can be traditionally liberal or traditionally conservative causes, ranging from abortion rights to voting rights to tort reform. See *infra* Part I.

25. See Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689 (1995) (coining the term to describe the lack of independence and impartiality that elected judges suffer from because of the need to satisfy the electorate to obtain and retain their jobs).

26. Grannis, *supra* note 9, at 418 (“[I]t may be that the best way to preserve the impartiality of elected judges is not to elect them.”).

27. In fact, there are at least three federal statutes that regulate judicial disqualification. 28 U.S.C. §§ 47, 144, 455 (2013). These statutes have been discussed extensively in the literature, and I will only mention them in this Article in passing. Most states have also adopted recusal statutes. See Amanda Frost, *Keeping Up Appearances: A Process-Oriented Approach to Judicial Recusal*, 53 U. KAN. L. REV. 531, 538 n.24 (2005).

28. See, e.g., Frost, *supra* note 27; Sarah M.R. Cravens, *In Pursuit of Actual Justice*, 59 ALA. L. REV. 1 (2007).

II will briefly discuss the recusal standards and practices in the states that elect judges.

In Part III, I conclude that recusal has failed to prevent biased judges from rendering judicial decisions. Indeed, I suggest that recusal *cannot* serve as the solution to the problem of biased judges. Part of the reason is that in most jurisdictions, it is the judge herself who must decide whether to recuse. It is foolhardy to put the recusal power in the hands of those most likely to be biased. But putting aside the procedural concern, recusal suffers from another fatal flaw. All elected judges must contend with the majoritarian difficulty outlined above and must worry about how their decisions will be perceived by the voters in the next election. That means that whoever replaces the recused judge will necessarily be subject to the same majoritarian pressures.<sup>29</sup> Admittedly, recusal done right could eliminate the bias toward or against the immediate litigants, but even a perfectly implemented recusal procedure fails to account for the majoritarian difficulty altogether.

I conclude with some thoughts on where we can go from here and discussion of whether there are other potential solutions to the problem of judicial bias.

## I.

### THE BIAS PROBLEM

#### A. *Sources of Bias*

Although judicial elections<sup>30</sup> have been a part of our legal landscape for over 150 years, today's judicial elections look very little like their early predecessors. For decades, judicial elections were "sleepy" and "low-key"<sup>31</sup>: Turnout and salience were low, while roll-off<sup>32</sup> and

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29. Of course, if a state could ensure that the recused judge is replaced with a judge approaching retirement—or perhaps a judge who promises not to run for reelection—this concern would be obviated. However, this is unlikely to be a workable solution, for it is unlikely that enough judges will be nearing retirement to handle any state's overcrowded docket.

30. There are three kinds of judicial elections: partisan, non-partisan, and retention. Much has been written about these elections. *See generally* SHUGERMAN, *supra* note 8, at 267–69. The differences are irrelevant to this article, as all three forms of judicial elections suffer from similar defects. This is also likely to become truer as retention elections become more competitive and incumbent candidates continue to suffer defeats as they have done in the past few years. *See* Pozen, *supra* note 12 (describing ways in which retention elections have become more competitive).

31. SHUGERMAN, *supra* note 8, at 241; *see also* Richard Briffault, *Public Funds and the Regulation of Judicial Campaigns*, 35 *IND. L. REV.* 819, 819 (2002) (explaining that judicial elections "were once low-key affairs, conducted with civility and dignity"); David Schultz, *Minnesota Republican Party v. White and the Future of State*

incumbent retention rates were high.<sup>33</sup> Today, judicial elections look very much like elections for legislative and executive offices: spending and salience are high, while incumbent retention rates have dropped. As a result of these changes, judicial elections have been described as either “nightmarish” or “healthy,” depending on the author’s point of view.<sup>34</sup> These races are often very competitive, with substantial spending by the candidates and their supporters. Although the elections have been transformed in a number of different ways, there are three key changes I will highlight in this Part. These three changes, I argue, are the most important sources of increased judicial bias.

### 1. *The Corrupting Influence of Money*

The first bias-inducing change to judicial elections has to do with the explosion of money in judicial races. Money was not a major part of older judicial elections, and the elections were relatively inexpensive, meaning that judges did not need to fundraise.<sup>35</sup> With few people contributing money to either sitting judges running for re-election or candidates for office, judges were less likely to hear cases involving contributors. There was little television advertising, which kept expenses down.<sup>36</sup> Independent expenditures were also less common.<sup>37</sup> And because judges often ran unopposed,<sup>38</sup> there was little need for sitting judges to spend their own money on their campaigns.

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*Judicial Selection*, 69 ALB. L. REV. 985, 985 (2006) (“Judicial selection is a historically sleepy affair . . .”).

32. Roll-off happens when voters cast their ballots for other races but fail to do so in a judicial race on the same ballot. See Lawrence Baum, *Judicial Elections and Judicial Independence: The Voter’s Perspective*, 64 OHIO ST. L.J. 13, 19–20 (2003).

33. Pozen, *supra* note 12, at 297 (discussing the historic pattern of high retention rates in judicial elections). As discussed *infra*, this pattern seems to be changing.

34. *Id.* at 317 (discussing the notion that judicial elections are becoming “healthier than ever on many standard indices”); Schultz, *supra* note 31, at 985 (“[J]udicial elections may look increasingly more nightmarish . . .”).

35. SHUGERMAN, *supra* note 8, at 10 (describing earlier judicial election campaigns as “relatively inexpensive”).

36. Today, television advertising is one of the most expensive components of a judicial election campaign. See Jordan M. Singer, *Knowing Is Half the Battle: A Proposal for Prospective Performance Evaluations in Judicial Elections*, 29 U. ARK. LITTLE ROCK L. REV. 725, 731 (2007) (“In 2004, more than \$24 million was spent on television ads in highest court races—one-fourth of all dollars raised by the candidates.”).

37. Shirley S. Abrahamson, *The Ballot and the Bench*, 76 N.Y.U. L. REV. 973, 977–78 (2001) (discussing the increases in campaign expenditures); Pozen, *supra* note 12, at 306 (arguing that “campaigns have become more expensive and competitive”).

38. Pozen, *supra* note 12, at 267 (“Many incumbents ran unopposed.”).

Today, these elections are very expensive. We have gone from spending almost nothing on judicial elections to spending approximately \$83.3 million between 1990 and 1999, up to \$206.9 million from 2000 to 2009.<sup>39</sup> Seemingly, records for the amounts of money being raised and spent are broken every new election cycle.<sup>40</sup> As a result of this transformation, judges spend significant amounts of time and energy raising money. Certainly, a reelection campaign is no longer a one-person endeavor.<sup>41</sup>

This rise in spending has significant implications for judicial impartiality. Because there are now many contributors and spenders, judges frequently hear cases involving parties (or attorneys) who helped them get elected.<sup>42</sup> For example, a recent Pennsylvania study showed that nearly two-thirds of cases heard by the state supreme court in 2008 and 2009 involved at least one party, lawyer, or law firm that contributed to the campaign of at least one of the justices.<sup>43</sup> This should come as no surprise, as it is precisely the parties that are most likely to appear in front of a judge who have the most interest in currying the judge's favor with campaign contributions or independent expenditures.<sup>44</sup>

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39. JAMES SAMPLE ET AL., BRENNAN CTR. FOR JUSTICE, *THE NEW POLITICS OF JUDICIAL ELECTIONS 2000–2009: DECADE OF CHANGE* 1, 8 (2010), <http://www.brennancenter.org/sites/default/files/legacy/JAS-NPJE-Decade-ONLINE.pdf>.

40. See Singer, *supra* note 36, at 730–31 (discussing record-breaking campaigns in judicial elections throughout the United States).

41. See Pozen, *supra* note 12, at 306 (explaining that “the time drain of campaigning has, one assumes, become more pressing in recent years”).

42. See Carrington & Long, *supra* note 17, at 474. A *New York Times* study showed that Supreme Court of Ohio justices routinely heard cases involving parties or amici who gave them campaign contributions. Adam Liptak & Janet Roberts, *Campaign Cash Mirrors a High Court's Rulings*, N.Y. TIMES, Oct. 1, 2006, at A1. Public confidence in judicial impartiality has also suffered as a result. In an important study by Justice at Stake, eighty-six percent of those surveyed expressed concern that “lawyers are the biggest campaign contributors to judicial candidates, and they often appear in court before judges they’ve given money to.” GREENBERG QUINLAN ROSNER RESEARCH INC., JUSTICE AT STAKE & AM. VIEWPOINT, *JUSTICE AT STAKE FREQUENCY QUESTIONNAIRE* 8 (2001), [http://www.justiceatstake.org/media/cms/JASNationalSurveyResults\\_6F537F99272D4.pdf](http://www.justiceatstake.org/media/cms/JASNationalSurveyResults_6F537F99272D4.pdf).

43. Malia Reddick & James R. DeBuse, *Campaign Contributors and the Pennsylvania Supreme Court*, 93 JUDICATURE 164 (2010). Other surveys have concluded that in many states, “nearly half of all supreme court cases involve someone who has given money to one or more of the judges hearing the case.” James Sample, *Democracy at the Corner of First and Fourteenth: Judicial Campaign Spending and Equality*, 66 N.Y.U. ANN. SURV. AM. L. 727, 749 (2011).

44. In *Caperton*, the Court appeared to recognize that the independent expenditures, like direct contributions, by one of the litigants to help a judge's campaign could create an intolerable probability of bias; in fact, the Court repeatedly referred to the independent expenditures in the case as “contributions.” *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 884–86 (2009). This blurring surprised election law scholars

*Caperton* is the prototypical example. When it came time to elect a justice to the Supreme Court of Appeals of West Virginia, Don Blankenship, whose company is a frequent litigant in front of that court, was the biggest spender in the judicial election. And despite Justice Kennedy's repeated claims that *Caperton* is unique, extreme, and unusual, that is simply not the case. In fact, the *Caperton* situation is quite common.<sup>45</sup> And it is no stretch to believe that a judge hearing a case involving a contributor would feel a debt of gratitude toward that individual—indeed, to feel otherwise would defy bedrock social norms.<sup>46</sup> In addition, with the next election always just around the corner,<sup>47</sup> an elected judge must always be thinking about whether the

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because the Court, since *Buckley v. Valeo*, had sustained a bright-line distinction between independent expenditures and contributions. See *Buckley v. Valeo*, 424 U.S. 1, 79 (1976) (recognizing a constitutionally significant difference between independent expenditures and direct campaign contributions). Although the *Caperton* Court does not expressly recognize that independent expenditures in judicial elections are inherently corrupting in the sense that they could be banned consistent with the First Amendment, the Court appears to acknowledge that “there are circumstances in which independent expenditures have the same potential to corruptly influence the actions of elected officials as contributions.” Richard Briffault, *Super PACs*, 96 MINN. L. REV. 1644, 1656 (2012).

45. For example, just a few years earlier, the Illinois Supreme Court heard *Avery v. State Farm Mutual Automobile Insurance Co.*, 835 N.E.2d 801 (Ill. 2005). *Avery* was an appeal of a one-billion-dollar verdict against State Farm. While the case was pending, Illinois held its election for a seat on the state supreme court. The candidates for that seat received a record \$9.3 million in campaign contributions. JAMES SAMPLE ET AL., BRENNAN CTR. FOR JUSTICE, FAIR COURTS: SETTING RECUSAL STANDARDS 20–23 (2008). Lloyd Karmeier won the election, having received hundreds of thousands of dollars in contributions from State Farm employees and lawyers. See *Hale v. State Farm Mut. Auto. Ins. Co.*, No. 12-0660-DRH, 2013 WL 1287054, at \*2 (S.D. Ill. Mar. 28, 2013). He then cast the deciding vote to overturn the verdict against State Farm. *Id.* The United States Supreme Court denied the petition for certiorari. Two other incidents involving the Ohio Supreme Court and the Michigan Supreme Court are described by Roy Schotland in *Comment on Professor Carrington's Article “The Independence and Democratic Accountability of the Supreme Court of Ohio,”* 30 CAP. U. L. REV. 489, 493–94 (2002).

46. See Thomas M. Susman, *Reciprocity, Denial, and the Appearance of Impropriety: Why Self-Recusal Cannot Remedy the Influence of Campaign Contributions on Judges' Decisions*, 26 J.L. & POL. 359, 366 (2011) (discussing the “reciprocity principle,” which is the notion that once an individual benefits from an action of another it is expected that the recipient of the benefit return the favor). The Supreme Court cited this commonsense intuition in *Caperton*. See 556 U.S. at 882 (“Though not a bribe or criminal influence, Justice Benjamin would nevertheless feel a debt of gratitude to Blankenship for his extraordinary efforts to get him elected.”).

47. Elected state court judges generally serve shorter terms than appointed judges. This is particularly true of lower state court judges, who typically serve relatively short terms of four to eight years. See Roy A. Schotland, *Republican Party of Minnesota v. White: Should Judges Be More Like Politicians?*, 41 JUDGES' J. 7, 10 (2002) (discussing the effect of short terms for judges on judicial independence). For an excellent discussion on the interrelationship between judicial independence, accountabil-

same contributor would support his or her next election bid, which is likely to be more expensive given the trend in spending in judicial elections.

## 2. *Broken Promises*

The second bias-inducing transformation of judicial elections has to do with the evolution of judicial campaigns and the candidates' conduct during those campaigns. In pre-1980s judicial elections, judges were seldom seen and even more seldom heard, rarely appearing on the campaign trail.<sup>48</sup> Because the public rarely paid attention to judicial elections, there was simply no need to discuss any substantive legal issues.<sup>49</sup>

Even judges who wanted to campaign were very limited in what they could say on the campaign trail. Ethics codes, as well as customs and tradition, prevented judges from speaking out on substantive issues that would likely need to be resolved by the judiciary.<sup>50</sup> That all changed with *Republican Party of Minnesota v. White*. There, the Supreme Court struck down a portion of Minnesota's Code of Judicial Conduct that prohibited judges from announcing their views on issues that were likely to arise in front of the Court.<sup>51</sup> The First Amendment, Justice Scalia explained, does not allow a state to impose such a broad restriction on a candidate's speech.<sup>52</sup> If a state chooses to select its

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ity, and the length of judicial terms, see Jed Handelsman Shugerman, *The Twist of Long Terms: Judicial Elections, Role Fidelity, and American Tort Law*, 98 GEO. L.J. 1349 (2010).

48. Pozen, *supra* note 12, at 297 (describing how “[c]ampaigning was minimal[,] incumbents almost always won[, and] few people voted or cared” in judicial elections of the past).

49. *Id.*

50. Rachel Paine Caufield, *In the Wake of White: How States Are Responding to Republican Party of Minnesota v. White and How Judicial Elections Are Changing*, 38 AKRON L. REV. 625, 629–32 (2005) (discussing the regulation of judicial campaign speech before the Supreme Court's decision in *White*).

51. *Republican Party of Minn. v. White*, 536 U.S. 765 (2002).

52. *Id.* Although the challenge in *White* concerned only the “announce clause” of the *Minnesota Code of Judicial Conduct*, similar challenges to other restrictions on judicial candidate speech are being heard by the lower courts, including pledges or promises clauses (banning “pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office”), commit clauses (banning “statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court”), and misrepresent clauses (banning judicial candidates from knowingly misrepresenting facts concerning themselves or an opponent). See, e.g., *Pa. Family Inst. v. Black*, 489 F.3d 156 (3d Cir. 2007) (concerning a challenge to a “pledges or promises clause” set forth in Pennsylvania's judicial ethics rules); *Winter v. Wolnitzek*, 56 F. Supp. 3d 884 (E.D. Ky. 2014) (prohibition on misleading statements and misrepresentations); *Carey v. Wolnitzek*, No. 3:06-36-KKC, 2012 WL 4597236 (E.D. Ky. Sept. 29, 2012) (commit

judges by elections, candidates for the judicial office must have the right to announce their positions during the campaign.<sup>53</sup>

As a result, judges frequently take office having expressed their position on a number of controversial issues. In part, they do so because special interest groups frequently send judicial candidates questionnaires seeking their views on whatever issues are of interest to those particular groups.<sup>54</sup> Voters now expect judicial candidates to take positions on issues that they will face.<sup>55</sup> For example, because criminal law issues are so salient in judicial campaigns, many judges have promised to be tough on crime.<sup>56</sup>

Why might this be problematic? As the dissenters in *White* explained, a judge taking office having made certain promises to the electorate—or even simply having announced her views on controversial issues that are likely to arise—might feel undue pressure to live up to those promises.<sup>57</sup> Although there are no studies demonstrating a conclusive link between statements made during judicial campaigns and judicial decisions in office, common sense and human nature suggest that judges consider the promises they have made in deciding cases.<sup>58</sup> As California’s former Chief Justice Ronald George explained, “When a candidate for judicial office speaks during an election campaign about his or her views on issues that may come before the court, voters reasonably will anticipate that he or she will render

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clause). The Supreme Court recently upheld Florida’s ban on direct solicitation by judges. *See Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656 (2015).

53. Of course, a state is not required to elect its judges, and there are a variety of modes of election or appointment adopted by the states for different judgeships. *See Am. Bar Ass’n, Fact Sheet on Judicial Selection Methods in the States*, [http://www.americanbar.org/content/dam/aba/migrated/leadership/fact\\_sheet.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/leadership/fact_sheet.authcheckdam.pdf) (last visited Sept. 13, 2015).

54. Frost & Lindquist, *supra* note 23, at 734.

55. *See* Charles W. “Rocky” Rhodes, *Navigating the Path of the Supreme Appointment*, 38 FLA. ST. U. L. REV. 537, 577 (2011) (“[V]oters now expect state judicial candidates to express their views on topics such as gay and lesbian rights, abortion rights, school prayer, and religious displays.”).

56. *See* Swisher, *supra* note 6, at 327–38.

57. *Republican Party of Minn. v. White*, 536 U.S. at 816 (Ginsburg, J., dissenting). The dissenters point out that the concern about appearance of impartiality is the reason why Supreme Court Justices rarely make any substantive comments in the course of their confirmation hearings, even though they do not have to face confirmation again. *Id.* at 800, 807 n.1.

58. It is not unusual for a politician to be criticized heavily for breaking a campaign promise. One of the most famous examples is George H.W. Bush’s promise of “no new taxes.” *See, e.g., Z. Bryan Wolf, Six Things Presidents Wish They Hadn’t Said*, CNN (Nov. 2, 2013), <http://www.cnn.com/2013/11/02/politics/obama-read-my-lips-moment/>.

decisions in accordance with those personal views.”<sup>59</sup> Left unsaid in Chief Justice George’s statement are the implications for judicial decision-making: if voters expect a judge to rule in accordance with the judge’s campaign statements, the judge is likely to be concerned about being perceived as breaking those promises. In other words, a judge deciding a case involving an issue on which the judge campaigned might be biased in favor of the previously announced views precisely because of those earlier statements.<sup>60</sup>

### 3. *The Majoritarian Difficulty*

But there is an even greater concern. In an influential 1995 article, Professor Steven Croley coined the term “majoritarian difficulty.”<sup>61</sup> The term refers to the idea that an elected judge hearing a case would be tempted to decide the case according to the preferences of the majority (i.e., the people who will decide whether the judge remains in the job), even if doing so is contrary to the law.<sup>62</sup> Because judges often have wide latitude in reaching legal decisions, it would not be a willful misapplication of the law to “impose an undeservedly harsh sentence on a criminal defendant or find an out-of-state corporation liable to a class of state citizens, despite weak evidence of wrongdoing.”<sup>63</sup> When a reading an ambiguous statute or interpreting a vague constitutional provision, a judge may be tempted to choose a more popular reading to appease the electorate.<sup>64</sup>

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59. Ronald M. George, *Foreword: Achieving Impartiality in State Courts*, 97 CALIF. L. REV. 1853, 1861 (2009). Chief Justice George criticizes the practice of announcing views on controversial issues because “it may well be misleading for candidates for judicial office to provide information concerning their individual views during a campaign, because doing so in such a context suggests that the judge will conform to those views regardless of the state of the law.” *Id.* at 1862.

60. For a discussion of the obligation to keep promises, see generally CHARLES FRIED, *CONTRACT AS A PROMISE: A THEORY OF CONTRACTUAL OBLIGATIONS* 19 (1981); T.M. SCANLON, *WHAT WE OWE TO EACH OTHER* 296 (1998).

61. Croley, *supra* note 25, at 693. The majoritarian difficulty is the counter to Alexander Bickel’s famous countermajoritarian difficulty, which has been at the heart of all constitutional theory. *Id.*; see also Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 YALE L.J. 153, 155 (2002).

62. Frost & Lindquist, *supra* note 23, at 731 (“[E]lective judiciaries pose a risk to the rule of law, which is compromised whenever a judge’s ruling is influenced by majority preferences.”).

63. *Id.* at 723.

64. *Id.* (hypothesizing that “elected judges will succumb to the pressure to decide close cases as the majority of the electorate would prefer, rather than as the law requires”). Judges admit that such factors enter their decision-making. See Paul Reidering, *The Politics of Judging*, 73 A.B.A. J. 52, 58 (1987). Justice Scalia once

But just as with money and promises, the majoritarian difficulty was at one time only difficult in theory. Judicial elections historically had such low salience that elected judges had little reason to tailor their decisions to public opinion. Incumbents often ran unopposed, and even when they faced a challenger, they almost always won.<sup>65</sup> Unlike elections for other elected offices, judges could feel safe in their job, knowing that nobody was watching.

That has all changed in recent years. As judicial elections have become more competitive, individual rulings face closer scrutiny and pose a greater risk to a judges' careers.<sup>66</sup> As Justice Otto Klaus famously remarked, "There's no way a judge is going to be able to ignore the political consequences of certain decisions, especially if he or she has to make them near election time. That would be like ignoring a crocodile in your bathtub."<sup>67</sup> In recent years, a number of judges have either lost elections as a result of unpopular decisions or squeaked out narrow victories after unpopular decisions were used against them by challengers. Recently, three justices of the Iowa Supreme Court were voted out of office for their controversial decision to strike down a state statute defining marriage as between a man and a woman.<sup>68</sup> On average, of course, incumbents are still likely to win their reelection, but the job is no longer safe for a sitting judge.<sup>69</sup> And

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quipped that "[t]he first instinct of power is the retention of power." *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 263 (2003) (opinion of Scalia, J.).

65. David E. Pozen, *Judicial Elections as Popular Constitutionalism*, 110 COLUM. L. REV. 2047, 2051 (2010) ("Under the traditional model of judicial elections . . . incumbents almost always won.").

66. See, e.g., Deborah Goldberg, *Interest Group Participation in Judicial Elections* ("Sitting judges facing an imminent election . . . know that every decision is potentially fodder for the opposition. When well-heeled or well-organized interest groups can seize on isolated opinions—even well-reasoned decisions that have been joined by a majority of other judges on the court—as the basis for attack ads in the next campaign, it takes extraordinary integrity and real courage for a judge facing reelection to support a ruling that plainly will be unpopular."), in *RUNNING FOR JUDGE: THE RISING POLITICAL, FINANCIAL, AND LEGAL STAKES OF JUDICIAL ELECTIONS* 73, 75 (Matthew J. Streb ed., 2007); Nicole Mansker & Neal Devins, *Do Judicial Elections Facilitate Popular Constitutionalism; Can They?*, 111 COLUM. L. REV. SIDEBAR 27, 33 (2011) ("[P]ast judicial elections have taught that justices can be ousted due to their vote in a single case on one of these topics, often a vote portrayed incorrectly or deceptively by the opposition campaign or interest group.").

67. Reidinger, *supra* note 64, at 58.

68. See Todd E. Pettys, *Letter from Iowa: Same-Sex Marriage and the Ouster of Three Justices*, 59 U. KAN. L. REV. 715 (2011).

69. Some estimate the judicial election races are now at least as competitive as races for the U.S. House of Representatives. See Melinda Gann Hall, *State Supreme Courts in American Democracy: Probing the Myths of Judicial Reform*, 95 AM. POL. SCI. REV. 315, 319 (2001) ("The fact of the matter . . . is that supreme court justices

as judicial elections become more and more competitive, pressures to impress the voting public at all costs will continue to increase.

### B. *Evidence of Bias*

So far, we have only shown that judicial elections—in particular, the modern judicial elections characterized by high spending, more substantive judicial campaigns, and greater levels of competition—create the *potential* for judicial bias. But perhaps judges can ignore these temptations and act impartially once they reach the bench. After all, in the words of Blackstone, “[t]he law will not suppose a possibility of bias or favor in a judge, who is already sworn to administer impartial justice, and whose authority greatly depends upon that presumption and idea.”<sup>70</sup> Testifying in support of Justice Alito’s confirmation to the United States Supreme Court, Third Circuit Judge Edward Becker explained: “The public doesn’t understand what happens to you when you become a judge. When you take that judicial oath, you become a different person.”<sup>71</sup>

As comforting as Judge Becker’s testimony sounds, common sense tells us it is Pollyannaish in the extreme. After all, judges are human beings subject to the same temptations and influences as the rest of us.<sup>72</sup> A number of recent studies have confirmed that this commonsense intuition is indeed correct. On the whole, these studies show that elected judges are biased, and these biases run precisely along the lines we expected: in favor of the interests that can help judges be reelected (e.g., donors) and against the interests that cannot (out-of-state parties). Certain disfavored litigants, including criminal defendants, fare poorly across a number of dimensions and across jurisdictions.

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face competition that is, by two of three measures, equivalent if not higher to that for the U.S. House.”).

70. 3 WILLIAM BLACKSTONE, COMMENTARIES \*361.

71. *Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. to be an Associate Justice of the Supreme Court of the United States Before the S. Comm. on the Judiciary*, 109th Cong. 655–56 (2006) (statement of Judge Edward Becker).

72. Chris Guthrie et al., *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 829 (2001) (demonstrating “that judges rely on the same cognitive decision-making process as laypersons and other experts, which leaves them vulnerable to cognitive illusions that can produce poor judgments”); Daniel Hinkle, *Cynical Realism and Judicial Fantasy*, 5 WASH. U. JURIS. REV. 289, 297 (2013) (“[J]udges are humans who are subject to the same biases and flaws that all humans are susceptible of when making decisions.”).

Perhaps most concerning, the studies show that judges overwhelmingly rule in favor of their campaign contributors.<sup>73</sup> Every dollar a litigant spends on a judicial election increases the likelihood that the judge will rule in that litigant's favor.<sup>74</sup> This is especially true if one of the parties (or its lawyers) made a significant contribution to the judge's campaign.<sup>75</sup> And even when both sides contributed to a judge's campaign, the party that contributed more fares better.<sup>76</sup>

The studies also show that judges are biased against out-of-state defendants. One study showed that the average damages award was \$150,000 higher against out-of-state defendants.<sup>77</sup> Of course, this redistribution of wealth to in-state litigants is entirely rational—taking care of the local donors and voters takes priority.<sup>78</sup> In the words of West Virginia Justice Richard Neely, “As long as I am allowed to redistribute wealth from out-of-state companies to injured in-state plaintiffs, I shall continue to do so. . . . [M]y job security [is enhanced], because in-state plaintiffs, their families, and their friends will reelect me.”<sup>79</sup>

If we turn our attention to criminal cases, the situation is no better. As judicial elections get closer, elected judges tend to sentence

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73. Michael S. Kang & Joanna M. Shepherd, *The Partisan Price of Justice: An Empirical Analysis of Campaign Contributions and Judicial Decisions*, 86 N.Y.U. L. REV. 69 (2011); Stephen J. Ware, *Money, Politics and Judicial Decisions: A Case Study of Arbitration Law in Alabama*, 30 CAP. U. L. REV. 583, 584 (2002); Margaret S. Williams & Corey A. Ditslear, *Bidding for Justice: The Influence of Attorneys' Contributions on State Supreme Courts*, 28 JUST. SYS. J. 135, 136 (2007) (concluding that some Wisconsin judges tend to rule in favor of contributors); see also Liptak & Roberts, *supra* note 42 (concluding that Supreme Court of Ohio justices ruled in favor of their contributors more than seventy percent of the time).

74. Kang & Shepherd, *supra* note 73, at 73 (“We find that every dollar of contributions from business groups is associated with increases in the probability that elected judges will decide for business litigants.”).

75. Aman McLeod, *Bidding for Justice: A Case Study About the Effect of Campaign Contributions on Judicial Decision-Making*, 85 U. DET. MERCY L. REV. 385, 386 (2008).

76. Vernon V. Palmer, *The Recusal of American Judges in the Post-Caperton Era: An Empirical Assessment of the Risk of Actual Bias in Decisions Involving Campaign Contributors*, 10 GLOBAL JURIST 3, 8 (2010).

77. Alexander Tabarrok & Eric Helland, *Court Politics: The Political Economy of Tort Awards*, 42 J.L. & ECON. 157, 163 (1999) (concluding that elected judges frequently redistribute wealth from out-of-state defendants to in-state plaintiffs).

78. Mark A. Behrens & Cary Silverman, *The Case for Adopting Appointive Judicial Selection Systems for State Court Judges*, 11 CORNELL J.L. & PUB. POL'Y 273, 289 (2002) (stating that an elected judge may rationally favor in-state plaintiffs, who vote and have friends and relatives who vote, over out-of-state corporations).

79. RICHARD NEELY, *THE PRODUCT LIABILITY MESS* 4 (1988).

criminal defendants more harshly.<sup>80</sup> And when that sentence is the death penalty, an elected judge is much more likely to sentence a defendant to death when judicial elections are close.<sup>81</sup> One study found that “criminal defendants [convicted of murder] were approximately 15% more likely to be sentenced to death when the sentence was issued during the judge’s election year.”<sup>82</sup> None of this comes as a surprise, as criminal justice issues figure prominently in contested judicial elections.<sup>83</sup>

And regardless of the type of case, empirical evidence seems to support the intuition of the majoritarian difficulty. A number of studies by Joanna Shepherd and others demonstrate that elected judges tend to decide cases at least partly in accordance with the preference of the electorate.<sup>84</sup> According to Shepherd, “[W]hen judges face [conservative electorates] in partisan reelections, they are more likely to [rule] for businesses over individuals, for employers in labor disputes, for doctors and hospitals in medical malpractice cases, for businesses in products liability cases, for original defendants in tort cases, and against criminals in criminal appeals.”<sup>85</sup> Admittedly, every judge without life tenure must consider retention politics,<sup>86</sup> but elected judges do it at a significantly higher level than appointed judges.

Finally, three relevant groups also believe that judicial decisions are influenced by the election process. First, judges confirm that they take electoral considerations into account when making legal judg-

80. See Gregory A. Huber & Sanford C. Gordon, *Accountability and Coercion: Is Justice Blind When It Runs for Office?*, 48 AM. J. POL. SCI. 247, 258 (2004) (finding that “all judges, even the most punitive, increase their sentences as reelection nears”).

81. Richard W. Brooks & Steven Raphael, *Life Terms or Death Sentences: The Uneasy Relationship Between Judicial Elections and Capital Punishment*, 92 J. CRIM. L. & CRIMINOLOGY 609, 610 (2002) (explaining that “criminal defendants [convicted of murder] were approximately 15% more likely to be sentenced to death when the sentence was issued during the judge’s election year”).

82. *Id.*

83. See Croley, *supra* note 25, at 734–75 (1995) (citing an increase in the number of elections where an incumbent judge loses because of criminal justice issues); cf. Kyle D. Cheek & Anthony Champagne, *Partisan Judicial Elections: Lessons from a Bellwether State*, 39 WILLAMETTE L. REV. 1357, 1365 (2003) (explaining that even advocates of tort reform frequently pay for appeals to criminal justice issues because those issues are more salient for voters).

84. Joanna M. Shepherd, *The Influence of Retention Politics on Judges’ Voting*, 38 J. LEGAL STUD. 169, 169 (2009) (“The evidence supports the widespread belief that judges respond to political pressure in an effort to be reelected . . .”).

85. Shepherd, *supra* note 19, at 661.

86. See Joanna M. Shepherd, *Are Appointed Judges Strategic Too?*, 58 DUKE L.J. 1589 (2009). In other words, even judges who are reappointed by the governor or the state legislature seem to exhibit biases toward those reappointing agents.

ments.<sup>87</sup> In one study, more than twenty-five percent of the respondents believed that contributions have at least “some influence” on judicial decisions; approximately fifty percent thought the contributions have at least “a little influence.”<sup>88</sup> Second, the contributors believe that their contributions make a difference.<sup>89</sup> And finally, approximately eighty percent of the public thought that judges were biased in favor of their contributors.<sup>90</sup> A similar percentage thought that judicial decisions were influenced by political considerations.<sup>91</sup> While public, or even judicial, opinions do not alone prove that judges are indeed biased, it shows that judicial elections create a strong appearance of bias, and that in itself is a problem for the judiciary.<sup>92</sup>

## II.

### THE PROMISE OF RECUSAL

The substantial risk—not to mention empirical evidence—of judicial bias stemming from elections is deeply troubling. The Supreme Court has held that the Due Process Clause requires judges to be impartial.<sup>93</sup> In fact, all other rights and constitutional protections, as well

87. Larry T. Aspin & William K. Hall, *Retention Elections and Judicial Behavior*, 77 JUDICATURE 306, 312 (1994) (concluding that “[e]ven though judges rarely lose retention elections and only 34.9 percent believe a poor judge will be voted out, still three-fifths believe judicial retention elections have a pronounced effect on judicial behavior”); Maura Anne Schoshinski, *Towards an Independent, Fair, and Competent Judiciary: An Argument for Improving Judicial Elections*, 7 GEO. J. LEGAL ETHICS 839, 842 (1994) (“Judges admit that they cannot completely trust themselves to hold in check the threats to their independence presented by judicial elections.”).

88. GREENBERG QUINLAN ROSNER RESEARCH, INC., JUSTICE AT STAKE & AM. VIEWPOINT, JUSTICE AT STAKE—STATE JUDGES FREQUENCY QUESTIONNAIRE 5 (2002), [http://www.justiceatstake.org/media/cms/JASJudgesSurveyResults\\_EA8838C0504A5.pdf](http://www.justiceatstake.org/media/cms/JASJudgesSurveyResults_EA8838C0504A5.pdf).

89. ADAM SKAGGS, BRENNAN CTR. FOR JUSTICE, BUYING JUSTICE: THE IMPACT OF CITIZENS UNITED ON JUDICIAL ELECTIONS 4–7 (2010), <https://www.brennancenter.org/sites/default/files/legacy/publications/BCReportBuyingJustice.pdf?nocdn=1> (summarizing evidence demonstrating that judicial campaign contributors believe that their spending influences judicial decisions).

90. Charles Gardner Geyh, *Why Judicial Elections Stink*, 64 OHIO ST. L.J. 43 (2003).

91. NAT’L CTR. FOR STATE COURTS, HOW THE PUBLIC VIEWS THE STATE COURTS: A 1999 NATIONAL SURVEY 41 (1999), [http://www.flcourts.org/core/fileparse.php/243/urlt/publicop\\_natl.pdf](http://www.flcourts.org/core/fileparse.php/243/urlt/publicop_natl.pdf).

92. See *Republican Party of Minn. v. Kelly*, 247 F.3d 854, 881 (8th Cir. 2001) (“The governmental interest in an independent and impartial judiciary is matched by its equally important interest in preserving public confidence in that independence and impartiality.”).

93. *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813 (1986); *Ward v. Monroeville*, 409 U.S. 57 (1972); *Tumey v. Ohio*, 273 U.S. 510 (1927) (holding that a judge violates due process when he has a financial interest to rule against one of the parties). Of course, every judge has some biases, and we simply have to accept some of them.

as the adversarial system itself, hinge on the idea that a judge acts as an impartial decision-maker.<sup>94</sup> If, as the evidence suggests, our elected state judges are not truly impartial, the implication for the rule of law is troubling, to say the least.

So how can judicial impartiality be bolstered in the state courts? For most legal academics, the best solution appears to be the elimination of judicial elections.<sup>95</sup> In the colorful words of Roy Schotland, “[M]ore sweat and ink have been spent on getting rid of judicial elections than on any other single subject in the history of American law.”<sup>96</sup> But judicial elections remain popular among the people, and it seems highly unlikely that states will revert back to an appointive judiciary any time soon.<sup>97</sup>

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Drawing a line between proper and improper biases is a difficult, if not impossible, exercise. But there are some biases that are clearly improper: relationship with one of the parties, one of the parties holds the keys to the judge’s job, debt, favors, or other motivators. As Professor Leubsdorf explained in an influential article, “One can scarcely advance the ideal of judicial impartiality without feeling doubts. We all take it for granted that personal values and assumptions help shape every judge’s decisions.” John Leubsdorf, *Theories of Judging and Judge Disqualification*, 62 N.Y.U. L. REV. 237–38 (1987). See also Martin H. Redish & Lawrence C. Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 YALE L.J. 455, 492 (1986) (acknowledging that reality of human nature “forces us to tolerate some bias”). Justice Scalia’s opinion in *Republican Party of Minnesota v. White* notes that complete judicial impartiality, in the sense of the judicial mind as a “tabula rasa,” is neither required nor desired. 536 U.S. 765, 778 (2002). The judge’s experiences, views, and upbringing may influence the judge’s decision without running afoul of due process. See BENJAMIN CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 168 (1921) (“The great tides and currents which engulf the rest of men, do not turn aside in their course, and pass the judges by.”).

94. See Monroe Freedman, *Judge Frankel’s Search for Truth*, 123 U. PA. L. REV. 1060, 1065 (1975) (“[The adversarial] system proceeds on the assumption that the best way to ascertain the truth is to present to an impartial judge or jury a confrontation between the proponents of conflicting views, assigning to each the task of marshalling and presenting the evidence for its side in as thorough and persuasive a way as possible.”).

95. Lawrence Baum, *Judicial Elections and Judicial Independence: The Voter’s Perspective*, 64 OHIO ST. L.J. 13, 41 (2003) (“There is widespread dissatisfaction today with the operation of judicial elections.”); Geyh, *supra* note 90, at 72–79 (arguing for the elimination of judicial elections); Scott D. Wiener, *Popular Justice: State Judicial Elections and Procedural Due Process*, 31 HARV. C.R.-C.L. L. REV. 187, 212 (1996) (concluding that compliance with due process requires the elimination of judicial elections). But see CHRIS W. BONNEAU & MELINDA GANN HALL, *IN DEFENSE OF JUDICIAL ELECTIONS* (2009) (arguing in favor of judicial elections); Michael R. Dimino, Sr., *The Worst Way of Selecting Judges—Except All the Others that Have Been Tried*, 32 N. KY. L. REV. 267 (2005).

96. Roy A. Schotland, *Judicial Independence and Accountability*, 61 L. & CONTEMP. PROBS. 149, 150 (1998).

97. Approximately eighty percent of the public favors judicial elections. See Geyh, *supra* note 90, at 52–53.

Some scholars have argued that judicial elections are not just problematic but are also unconstitutional. The argument has been most powerfully made by Professor Martin Redish, who has written that the use of judicial elections violates due process.<sup>98</sup> While the argument has some logical force, the Supreme Court has given no indication that it would entertain such an idea. To the contrary, Justice Scalia's opinion in *White* strongly suggested that because judicial elections have co-existed with the Due Process Clause for well over a century, any arguments that judicial elections violate the due process guarantee of impartiality are likely to fail.<sup>99</sup> Indeed, judicial elections have become so engrained in the fabric of this nation that it is difficult to imagine any court striking the institution down as a whole.

If elections are here to stay, then we are stuck with our current approach to judicial bias.<sup>100</sup> That approach centers on recusal. As most commonly formulated, if a judge is biased or if there is an appearance

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98. Martin H. Redish & Jennifer Aronoff, *The Real Constitutional Problem with State Judicial Selection: Due Process, Judicial Retention, and the Dangers of Popular Constitutionalism*, 56 WM. & MARY L. REV. 1, 2 (2014); Redish & Marshall, *supra* note 93, at 498 (finding that “the use of non-tenured state judges seems to be a clear violation of procedural due process” in at least some cases).

99. Republican Party of Minn. v. White, 536 U.S. 765, 783 (2002) (explaining that the dissenting justices’ “election-nullifying” views are not “reflected in the Due Process Clause of the Fourteenth Amendment, which has coexisted with the election of judges ever since it was adopted”).

100. There are, perhaps, two other alternatives. The first is to maintain judicial elections, but eliminate the factors that contribute to judicial bias. For example, some scholars have argued that rules for judicial elections should differ from the rules for other elections because of the due process concerns for litigants that will eventually argue before the elected judges. See Randall T. Shepard, *Campaign Speech: Restraint and Liberty in Judicial Ethics*, 9 GEO. J.L. ETHICS 1059, 1060 (1996). But in *White*, the Supreme Court largely ignored that suggestion, opting instead for a unilocal “an election is an election” approach. The Court’s recent decision in *Williams-Yulee*, however, slightly opens the door to such arguments and suggests that perhaps the Court would allow some regulations of judicial elections that would be unconstitutional in any other election. See *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656 (2015) (upholding Florida’s ban on personal solicitations of campaign funds by judicial candidates).

The second alternative is to implement some softer solutions: greater education of the public about the judicial role, testing and education of judicial candidates about bias, including, *inter alia*, unconscious and subconscious bias. See, e.g., Raymond J. McKoski, *Reestablishing Actual Impartiality as the Fundamental Value of Judicial Ethics: Lessons from “Big Judge Davis,”* 99 KY. L.J. 259, 295–324 (2011) (suggesting such strategies). I, too, have written about creating a more informed electorate, with the hope that this would lead judges to be less fearful about losing their jobs based on individual unpopular decisions. See Dmitry Bam, *Voter Ignorance and Judicial Elections*, 102 KY. L.J. 553 (2014). While I continue to believe these efforts are important, such efforts permit the sources of bias to continue and are unlikely to be entirely adequate.

of bias, the judge must step aside.<sup>101</sup> This was not always the case. Under British common law and at the time of the Founding, recusal was required only when the judge had a financial stake in the outcome of the case.<sup>102</sup> But Congress passed America's first recusal statute early in this nation's history, and that statute has been revised and expanded a number of times over the last 225 years.<sup>103</sup> Since then, recusal has become the central feature of judicial ethics codes,<sup>104</sup> as well as state recusal statutes.<sup>105</sup> In short, at both the state and federal levels, recusal is our solution to the bias problem.

Scholars have clung to recusal as a potentially viable solution to the problem of judicial bias. Some have argued that recusal is "the *only* effective means to ensure the impartiality of elected judges"<sup>106</sup> and that "recusal reform offers an effective, constitutional means of solving" the judicial bias problem that results from judicial elections.<sup>107</sup> In fact, recusal can arguably be "precisely targeted to preventing due process problems . . . without restricting campaign speech at all."<sup>108</sup> In the last decade, and especially since the *Caperton* decision, recusal has been a frequent topic in law journals.<sup>109</sup>

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101. See, e.g., TEX. CODE OF JUDICIAL CONDUCT Canon 3C (2002). See generally Gabriel D. Serbulea, *Due Process and Judicial Disqualification: The Need for Reform*, 38 PEPP. L. REV. 1109, 1151 (2011) (reviewing the recusal codes and statutes in all fifty states).

102. Debra Lyn Bassett, *Recusal and the Supreme Court*, 56 HASTINGS L.J. 657, 663 (2005) ("[H]istorically, the only basis for recusal was financial interest.").

103. See Dmitry Bam, *Making Appearances Matter: Recusal and the Appearance of Bias*, 2011 BYU L. REV. 943, 943 (discussing the evolution of the federal recusal statutes).

104. See, e.g., CONN. CODE OF JUDICIAL CONDUCT r. 2.11 (2011); N.M. CODE OF JUDICIAL CONDUCT r. 21-400 (2010).

105. See, e.g., CONN. GEN. STAT. ANN. § 51-39 (West 2015); LA. CODE CIV. PROC. ANN. art. 151 (2008); ME. REV. STAT. ANN. tit. 14, § 1103 (2015).

106. Molly McLucas, *The Need for Effective Recusal Standards for an Elected Judiciary*, 42 LOY. LA. L. REV. 671, 692 (2009) (emphasis added).

107. David K. Stott, *Zero-Sum Judicial Elections: Balancing Free Speech and Impartiality Through Recusal Reform*, 2009 BYU L. REV. 481, 482; see also Grannis, *supra* note 9, at 415 (explaining that recusal is "a manageable solution to the problem of possible judicial bias").

108. Friedland, *supra* note 22, at 568–70.

109. See, e.g., James M. Anderson et al., *Measuring How Stock Ownership Affects Which Judges and Justices Hear Cases*, 103 GEO. L.J. 1163 (2015); Debra Lyn Bassett & Rex R. Perschbacher, *The Elusive Goal of Impartiality*, 97 IOWA L. REV. 181 (2011); Kang & Shepherd, *supra* note 16; Patrick A. Woods, *Reversal by Recusal? Comer v. Murphy Oil U.S.A., Inc. and the Need for Mandatory Judicial Recusal Statements*, 13 U.N.H. L. REV. 177 (2015). See generally Correy Stephenson, *Legal Ethics a Hot Topic in 2011*, WIS. L.J. (Dec. 28, 2011, 10:11 AM), <http://wislawjournal.com/2011/12/28/legal-ethics-a-hot-topic-in-2011/>.

Judges, too, have suggested that recusal can be a remedy to the election-related bias problem. In his *White* concurrence, Justice Kennedy endorsed more stringent recusal standards as one acceptable means of preserving judicial impartiality.<sup>110</sup> In other words, to the extent that judicial campaigning endorsed by the Court's decision in *White* creates either bias or the appearance of bias, Justice Kennedy explained that stricter recusal standards can eliminate that problem. Lower court judges have echoed Kennedy's sentiment,<sup>111</sup> suggesting that to the extent that judicial elections lead to judicial bias, the recusal mechanism is in place to ensure that the case will be heard by an impartial arbiter.

Then came *Caperton*, and once again the Supreme Court offered recusal as the proposed remedy to judicial bias. *Caperton* held a great deal of promise. Here was the Court—a majority this time—giving some constitutional bite to recusal and perhaps even expanding the meaning of due process.<sup>112</sup> As an indication of *Caperton's* potential impact, the dissent fretted that recusal would become too powerful a tool in the hands of wily lawyers, who would abuse the recusal procedure for their advantage.<sup>113</sup>

This focus on recusal is not surprising. Recusal has tremendous allure because, in theory, it allows us to ensure judicial impartiality at the point of delivery. If recusal works to remedy election-related judicial bias, then states can continue with the practice of judicial elections and judicial candidates can have robust freedom of speech. Our methods of judicial selection and pre-judicial experiences of American judges do seem to require a post hoc remedy. Unlike judges throughout much of the rest of the world, American judges largely come from practice.<sup>114</sup> Many are well-known lawyers and members of their com-

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110. *Republican Party of Minn. v. White*, 536 U.S. 765, 794 (2002) (Kennedy, J., concurring).

111. *See, e.g., Family Tr. Found. v. Wolnitzek*, 345 F. Supp. 2d 672, 702 (E.D. Ky. 2004) (contending that judges whose impartiality could be questioned because of campaign promises could be required to recuse themselves under the state code of judicial conduct); *Stretton v. Disciplinary Bd.*, 763 F. Supp. 128, 137 (E.D. Pa. 1991).

112. Gerard J. Clark, *Caperton's New Right to Independence in Judges*, 58 *DRAKE L. REV.* 661, 661 (2010) ("In *Caperton v. A.T. Massey Coal Co.*, the United States Supreme Court expanded the Due Process Clause of the Fourteenth Amendment . . . ." (citing *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009))).

113. In his *Caperton* dissent, Chief Justice Roberts predicted a flood of recusal motions relying on the majority's reasoning. *Caperton*, 556 U.S. at 902 (Roberts, C.J., dissenting). As it turned out, however, Chief Justice Roberts's predictions have been unfulfilled. *See* Bruce A. Green, *Fear of the Unknown: Judicial Ethics After Caperton*, 60 *SYRACUSE L. REV.* 229 (2010).

114. *See generally* BENJAMIN H. BARTON, *THE LAWYER-JUDGE BIAS IN THE AMERICAN LEGAL SYSTEM* (2010).

munities, having established strong bonds with other lawyers and clients in the community.<sup>115</sup> As a result, American judges are more likely to come to the bench with biases and connections—even aside from the electoral influences—that recusal can remedy. Or can it? We turn to that question next.

### III.

#### A BROKEN PROMISE

Because our constitutional guarantee of judicial impartiality hinges greatly on the success of the recusal statutes and ethical rules regulating judicial disqualification, the critical question is this: can recusal remedy the judicial bias problem? I believe the answer is no. In this Article, I want to highlight two potential reasons. The first is the self-recusal procedure that is followed in most states. The second is that recusal simply does not work when it comes to fixing systemic bias stemming from the election process.

##### A. *Self-Recusal Procedure*

One major reason why recusal has failed is the self-recusal procedure. In most states, as in the federal courts, judges decide their own recusal motions.<sup>116</sup> This recusal procedure has been followed throughout the United States since the time of the Founding and was followed in England for centuries before that.<sup>117</sup> While there are some exceptions, the judge's decision usually is final, subject only to appellate review. That appellate review, however, is generally highly deferential to the judge's decision, and reversals are rare.<sup>118</sup>

This self-recusal procedure is particularly inappropriate when it comes to addressing election-related judicial bias for several reasons. First, in the course of their campaigns, candidates for judicial office make all sorts of statements, announcements, and promises.<sup>119</sup> In the next election, voters are likely to expect the judge to have some record as to the category of cases where the judge made promises before. As

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115. *Id.*

116. Raymond J. McKoski, *Disqualifying Judges When Their Impartiality Might Reasonably Be Questioned: Moving Beyond a Failed Standard*, 56 ARIZ. L. REV. 411, 448 (2014).

117. See John A. Meiser, *The (Non)problem of a Limited Due Process Right to Judicial Disqualification*, 84 NOTRE DAME L. REV. 1799, 1803 (2009) (“[O]ur recusal procedures grew out of English common law practice.”).

118. Jon P. McClanahan, *Safeguarding the Propriety of the Judiciary*, 91 N.C. L. REV. 1951, 1990 (2013) (observing that “self-recusal decisions are reviewed deferentially and rarely reversed on appeal”).

119. See *supra* notes 20–23 and accompanying text.

a result, we might expect judges to hesitate before disqualifying themselves from cases involving issues about which they had campaigned (and, presumably, the issues that voters care about most).<sup>120</sup> Judges who recuse themselves in cases that the voters care about most might find themselves out of a job.<sup>121</sup>

The second reason why the self-recusal procedure is ill-suited to addressing election-related judicial bias is that judges might feel that recusing themselves for their campaign statements and conduct would imply that the campaigning itself had been improper.<sup>122</sup> In addition, the ethics codes require judges to recuse *sua sponte*, meaning that recusal motions put judges in a difficult spot: “a successful motion to recuse requires the [judge] to admit that he failed in the first instance to adhere to statutory and ethical requirements.”<sup>123</sup> Even an unbiased judge may worry that a recusal sends a message that he is biased.<sup>124</sup>

Third, the self-recusal procedure is least effective particularly when it is needed most. Take, for example, the situation where a judge is biased in favor of a contributor to the judge’s previous election.<sup>125</sup>

120. See James Layman, *Judicial Campaign Speech Regulation: Integrity or Incen-*  
*tives?*, 19 GEO. J. LEGAL ETHICS 769, 775 (2006) (“[I]f a judge is required to recuse  
himself on all issues related to his campaign promises, ‘the voters do not get what  
they believe they were promised.’”). While there have been few studies of voter ex-  
pectations in judicial elections, studies of candidates running for office in other elec-  
tions suggest that those candidates expect voters to evaluate them based on their  
record in office. See R. DOUGLAS ARNOLD, *THE LOGIC OF CONGRESSIONAL ACTION*  
72–76 (1990) (arguing that voters evaluate the probability that a candidate will choose  
a voter-preferred policy based on an evaluation of the candidate’s records).

121. In fact, some have argued that requiring recusal under these circumstances un-  
dermines the purpose of judicial elections. Why have elections, the argument goes, if  
any substantive information that a candidate can provide to a voter about what they  
would do when in office disables the judge from doing what she promised? According  
to some scholars, providing voters with information about a judge, and then requiring  
the judge who provided the information to recuse from those cases, “work[s] a fraud  
on the voters.” Shepard, *supra* note 100, at 1076; see also Penny J. White, *A Matter of*  
*Perspective*, 3 FIRST AMEND. L. REV. 5, 63–75 (2004) (arguing that mandatory  
recusal rules might run afoul of First Amendment); Michael Zuckerman, *Judicial*  
*Recusal and Expanding Notions of Due Process*, 13 U. PA. J. CONST. L. 977, 1013  
(2011) (“If recusal burdens speech, then affording too much weight to a litigant’s due  
process rights may infringe upon the presiding judge’s right to speak outside the  
courtroom, including on the campaign trail, thus harming the marketplace of ideas.”).

122. This is similar to the rules problem of a judge who failed to recuse *sua sponte*.

123. R. Matthew Pearson, Note, *Duck Duck Recuse?: Foreign Common Law Gui-*  
*dance and Improving Recusal of Supreme Court Justices*, 62 WASH. & LEE L. REV.  
1799, 1833–34 (2005).

124. James Sample & David E. Pozen, *Making Judicial Recusal More Rigorous*,  
JUDGES’ J., Winter 2007, at 17, 20.

125. Laura E. Little, *Loyalty, Gratitude, and the Federal Judiciary*, 44 AM. U. L.  
REV. 699, 699 (1995) (“Ordinary rules of social interaction impose obligations of  
gratitude and loyalty on those who receive a significant benefit.”).

Recusal eliminates the judge's ability to repay his debt of gratitude.<sup>126</sup> And if a judge does recuse in every case involving that contributor, that contributor is likely to take his money elsewhere. As a result, the more biased the target judge is, the less likely that judge is to recuse himself.<sup>127</sup> In fact, in a *New York Times* study of judicial voting in the Supreme Court of Ohio, the *Times* found that in "the 215 cases with the most direct potential conflicts of interest, justices recused themselves just 9 times."<sup>128</sup>

Moreover, judges rarely recognize their own biases, or even the appearance of bias, because such bias is often subconscious.<sup>129</sup> *Caperton's* Justice Benjamin, for example, was convinced that he was not biased, and presumably, since he did not recuse, that no one could perceive him as biased.<sup>130</sup> Modern research in cognitive psychology tells us why<sup>131</sup>: the cognitive biases that affect judicial decisions make it impossible for judges to assess their own conduct dispassionately and open-mindedly. Psychologists refer to this phenomenon as the "bias blind spot."<sup>132</sup> Everyone, including a judge, makes decisions in a manner skewed to favor their own self-interest and to view themselves

126. In *Caperton*, the Supreme Court emphasized the debt of gratitude that Justice Benjamin owed to Don Blankenship as one of the reasons recusal was required under the Due Process Clause. *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 882 (2009).

127. See, e.g., Guthrie et al., *supra* note 72.

128. Liptak & Roberts, *supra* note 42.

129. See Deborah L. Rhode, *Moral Counseling*, 75 *FORDHAM L. REV.* 1317, 1333 (2006) ("Because so many biases operate on subconscious levels, it is often difficult for individuals to gauge the factors that may skew judgment."). The work of Jeffrey Rachlinski, Andrew Wistrich, and Chris Guthrie has demonstrated that judges suffer from similar unconscious biases as the general population. See Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 *NOTRE DAME L. REV.* 1195 (2009).

130. Melinda A. Marbes, *Refocusing Recusals: How the Bias Blind Spot Affects Disqualification Disputes and Should Reshape Recusal Reform*, 32 *ST. LOUIS U. PUB. L. REV.* 235, 276 (2013) ("Justice Benjamin did what most of us do when evaluating our own biases—he succumbed to the Introspection Illusion, which confirmed his belief that he was not biased in this specific instance."); Jeffrey W. Stempel, *Impeach Brent Benjamin Now!?: Giving Adequate Attention to Failings of Judicial Impartiality*, 47 *SAN DIEGO L. REV.* 1, 55 (2010) (discussing the standards applied and conclusions reached by Justice Benjamin).

131. Deana A. Pollard, *Unconscious Bias and Self-Critical Analysis: The Case for a Qualified Evidentiary Equal Employment Opportunity Privilege*, 74 *WASH. L. REV.* 913 (1999) (discussing unconscious bias); see also Robert A. Prentice, *The Case of the Irrational Auditor: A Behavioral Insight into Securities Fraud Litigation*, 95 *NW. U. L. REV.* 133, 143–80 (2000) (discussing self-serving bias).

132. Emily Pronin et al., *The Bias Blind Spot: Perceptions of Bias in Self Versus Others*, 28 *PERSONALITY & SOC. PSYCHOL. BULL.* 369, 370 (2002).

in the best light.<sup>133</sup> As a result of this tendency, people tend to think they are better than they actually are at a number of different tasks and on a number of different criteria, including fairness and ethics.<sup>134</sup> Specifically for purposes of this Article, judges overestimate their ability to remain impartial, ignoring the evidence of judicial bias.<sup>135</sup>

Making matters worse is that judges do not react well to requests for recusal. Many judges take offense when recusal motions are filed against them.<sup>136</sup> Michigan's experience with amending its recusal rules offers interesting insight. In 2009, the Michigan Supreme Court responded to *Caperton* by amending its court rules to permit the entire court to hear a party's disqualification motion if the challenged judge denied the motion in the first instance.<sup>137</sup> In a bitter dissent from the court's announcement of the procedural change, Justice Corrigan, on behalf of three justices, accused the four-justice majority of curtailing the fundamental freedoms of state judges and "depriv[ing] their co-equal peers of their constitutionally protected interest in hearing cases."<sup>138</sup> This territoriality and personal pride is part of the reason why litigants are afraid of bringing recusal motions, and can lead a judge to extract vengeance on the moving litigant.<sup>139</sup>

And while shifting the recusal decision to another judge may fix the constitutional objections to the self-recusal procedure, such a shift is unlikely to be a panacea. Judges generally like each other and hesi-

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133. See Ward Farnsworth, *The Legal Regulation of Self-Serving Bias*, 37 U.C. DAVIS L. REV. 567, 570 (2003).

134. David Messick et al., *Why We Are Fairer than Others*, 21 J. EXPERIMENTAL SOC. PSYCHOL. 480 (1985).

135. See Chris Guthrie et al., *The "Hidden Judiciary": An Empirical Examination of Executive Branch Justice*, 58 DUKE L.J. 1477, 1519–20 (2009). Interestingly, judges are able to identify this bias in their colleagues but not in themselves. Most judges simply see themselves as "above average." Guthrie et al., *supra* note 72, at 814–15.

136. Richard K. Neumann, Jr., *Conflicts of Interest in Bush v. Gore: Did Some Justices Vote Illegally?*, 16 GEO. J. LEGAL ETHICS 375, 392 (2003) ("The case law is filled with descriptions of defensive and angry judges denying motions that they recuse themselves.").

137. MICH. CT. R. 2.003(D)(3)(b). Prior to the change, the Michigan Supreme Court's recusal procedure was identical to that of the United States Supreme Court and that of nearly all the other state supreme courts. That is, each justice was in charge of his or her own recusal motion, without any oversight by his or her colleagues. See Jonathan Blitzer, *Recusal Reform in Michigan*, BRENNAN CTR. FOR JUST. (July 31, 2009), <http://www.brennancenter.org/blog/recusal-reform-michigan>.

138. *Pelligrino v. Ampco Sys. Parking*, 789 N.W.2d 777, 814 (Mich. 2010) (Corrigan, J., dissenting).

139. Neumann, *supra* note 136, at 392 ("The case law is filled with descriptions of defensive and angry judges denying motions that they recuse themselves."); Sample & Pozen, *supra* note 124, at 17, 19 ("[L]itigants may be afraid of bringing recusal motions for fear of angering their judge.").

tate to impugn each others' ability to remain impartial.<sup>140</sup> Furthermore, no third party can decide whether another judge is actually biased without a true adversarial process in which both sides present evidence of the judge's state of mind. Recusal is a dispute between a judge and a litigant, and an adversarial process that allows those two sides to present their dispute to a neutral third party would be cumbersome and inefficient.<sup>141</sup>

Of course, in *Caperton* itself the Supreme Court stepped in, allowing us to hold this symposium. But the Court's involvement is unusual. It hears only eighty cases every year, so there is generally little to no oversight of state court decisions, let alone state court recusal decisions. This means that every time a *Caperton* issue arises—and it arises almost every day in courtrooms throughout the country<sup>142</sup>—it will likely be resolved by the very judge whose recusal is being sought. And the result is not likely to be any different from the result reached by Justice Benjamin.

### B. *Recusal at the Wholesale Level*

Admittedly, in some circumstances, recusal works well. For example, recusal is perfectly suited for a situation where we can identify a specific source of bias that a particular judge suffers from. If the source of bias is unique to the judge in question—perhaps the judge owns stock in one of the companies, or the judge is friendly with one of the parties, or the judge has personal knowledge of the facts of the case—then recusal is a perfect fit.<sup>143</sup> The sources of bias are objectively identifiable, and other judges who do not suffer from the same bias may be found. Removing the biased judge from the case eliminates the bias entirely.<sup>144</sup> Moreover, a targeted prophylactic rule may

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140. Debra Lyn Bassett, *Judicial Disqualification in the Federal Appellate Courts*, 87 IOWA L. REV. 1213, 1237 (2002) (discussing the “resistance of other appellate judges to the idea of evaluating allegations of bias or prejudice against their colleagues”); Note, *Disqualification of a Federal District Judge for Bias: The Standard Under Section 144*, 57 MINN. L. REV. 749, 767 (1973) (“Many courts are understandably reluctant to disqualify a fellow judge since a finding of actual prejudice . . . impugns both that judge’s qualifications and those of the system he represents.”).

141. Caprice L. Roberts, *The Fox Guarding the Henhouse?: Recusal and the Procedural Void in the Court of Last Resort*, 57 RUTGERS L. REV. 107, 171 (2004) (discussing the efficiency concerns of third-party review of recusal decisions).

142. *Id.*

143. See 28 U.S.C. § 455(b) (2013) (listing specific circumstances when judicial disqualification is required).

144. For example, under § 455(b), a judge must recuse if he has “personal knowledge of disputed evidentiary facts concerning the proceeding.” Replacing that judge with one who does not have such “personal knowledge” alleviates the problem entirely.

prevent the biased judge from taking personal offense to a recusal motion, or can make recusal motions unnecessary since the grounds for recusal are objectively identifiable to any reasonable jurist.

But for election-related bias, things are not so simple. The majoritarian difficulty affects *every* state judge who must run for reelection. No judge is safe from the threat of losing the next election. Every judge must consider how her decisions will be characterized in the next election cycle or how potential contributors would react to the decision. And for this kind of bias, recusal is inadequate. Removing one judge who feels pressure to tailor her rulings toward a potential reelection bid and replacing her with another judge who feels identical pressure does little to ensure judicial impartiality. The case must still be heard by a judge—there is simply no way to get around that requirement—and every judge will suffer from the same job-security biases. The majoritarian difficulty applies to all elected judges, not just those who received campaign contributions.

In short, current recusal rules leave judges essentially immune from punishment for acting in a biased manner,<sup>145</sup> and when it comes to election-related judicial bias, recusal seems to be an inadequate solution. And as judicial elections become more and more competitive and expensive, the bias problem will become worse and worse.<sup>146</sup>

#### CONCLUSION

With every new study showing that elected judges are biased along a number of dimensions, the search for a solution gains additional urgency. Assuming judicial elections are here to stay and reform of judicial elections is forestalled by the Supreme Court's interpretation of the First Amendment, scholars must find new solutions to the problem of judicial bias. If judges are unable to check their own biases through recusal, then somebody else must act as such a check. The best recommendation so far has come from Amanda Frost and Stefanie Lindquist.<sup>147</sup> They suggest that the federal courts may be able to serve as a partial check on election-related judicial bias. This, of course, is true when it comes to questions of federal law, in particular constitutional rights. But that is an incomplete check. Most state law

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145. I am not suggesting that a draconian check is necessary. Cf. M.H. Hoeflich, *Regulation of Judicial Misconduct from Late Antiquity to the Early Middle Ages*, 2 L. & HIST. REV. 79, 82 (1984) (discussing the approaches adopted throughout Europe in the seventh and eighth centuries, including liability to the aggrieved party—and sometimes even the crown—on judges who decided cases as a result of favoritism to the other party).

146. See Pozen, *supra* note 12 (discussing this irony).

147. Frost & Lindquist, *supra* note 23.

decisions never reach the federal judiciary, either because of lack of resources or because they do not involve issues of federal law. The biases discussed in this Article take place in state trial courts. They are seen in the way that the courts decide summary judgment motions, motions to dismiss, and motions as a matter of law. Bias might pervade the awarding of damages in a bench trial, or ruling on objections in trial, or sentencing criminal defendants for violating state criminal law. In short, while turning to the federal courts as a check is a creative answer, it is woefully incomplete.

Five years ago, *Caperton* was celebrated as an important victory for judicial impartiality. The Due Process Clause would stand as a check on judicial bias to ensure that election-related bias would not influence judicial decisions. But I am convinced that recusal is not the answer, and replacing one elected judge with another using the disqualification procedure will not suffice.